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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C. 20554

In the Matter of	)	
	)	
Direct Access to the	)	IB Docket No. 98-192
INTELSAT System	)	File No. 60-SAT-ISP-97
	)	
	)	
	)	

To: The Commission

REQUEST OF COMSAT CORPORATION FOR STAY PENDING JUDICIAL REVIEW

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SUMMARY

COMSAT Corporation ("COMSAT") hereby requests that the Commission stay pending judicial review the implementation of the Report & Order adopted in *Direct Access to the INTELSAT System*, FCC 99-236, IB Docket No. 98-192 (rel. Sept. 16, 1999) ("*Order*"). The circumstances here satisfy all four of the Commission's criteria for a stay:

- **First, COMSAT is likely to succeed on the merits of its court challenge.** By dispossessing COMSAT of its exclusive right to provide INTELSAT satellite capacity to and from the United States, the *Order*
  - ◊ contradicts the Satellite Act's clear mandate that United States participation in the INTELSAT system shall be solely via COMSAT and that only COMSAT has the right—granted to no other—to "furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities."
  - ◊ is at odds with decades of consistent administrative and judicial pronouncements which affirm the statutory basis for COMSAT's exclusive franchise—on which foundation an industry has been organized for 37 years. This factor alone deprives the agency of the usual deference accorded its interpretation of statutes which it administers and should create a presumption of illegitimacy.
  - ◊ would deprive COMSAT of the opportunity to earn a reasonable return on the investment that it is legally compelled to make in INTELSAT, in violation of the Takings Clause.
  - ◊ is arbitrary and capricious in at least three key respects: (1) it permits INTELSAT to enter the U.S. satellite market directly, even though INTELSAT's privileges and immunities are much more significant than COMSAT's and therefore—under the Commission's own theory—pose a far greater threat to competition; (2) it assumes, without any basis, that COMSAT can force INTELSAT's Board to establish rates that reflect a market rate of return; and (3) it lacks any factual basis for presuming that COMSAT's carrier-customers would pass along any savings to the end users they serve.
- **Second, the *Order* threatens COMSAT with unrecoverable economic harm under applicable case law.** Unless stayed, the *Order* would allow users to contract with INTELSAT for U.S. services at the same prices that COMSAT

pays INTELSAT for the same services. The only payment to COMSAT would be a limited surcharge that does not even purport to compensate COMSAT for a significant portion of its acknowledged costs and would preclude any profit on sales. Thus, the immediate effect of the *Order* would be a loss of customers and revenue, which would constitute irreparable injury.[1]

- **Third, no interested party would suffer substantial harm by the grant of a stay.** A stay would merely preserve what has been the *status quo* over nearly four decades for a relatively brief period of court review. During that time, users who believe that COMSAT's prices are too high will—for the vast majority of all traffic—be able to take their business to any of COMSAT's numerous non-INTELSAT competitors. A stay would also avoid unnecessary expenditures of significant agency resources to respond to the reversal of the *Order*.

- **Fourth, granting a stay would not be adverse to the public interest.** The Commission has no factual basis in this proceeding upon which to conclude that direct access will affect the "retail" or end-user prices for, or quality of, international telecommunications services. COMSAT's charges represent only a tiny fraction of the cost of an international telephone call, and COMSAT's carrier-customers have made no commitment to pass through any savings they may achieve. Nor would the public interest be served by the direct entry of a fully immunized and tax-exempt INTELSAT into the U.S. market. Thus, the implementation of direct access would not benefit the public.

Accordingly, the Commission should immediately grant COMSAT's request for stay.

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[1] Further, when calling for COMSAT's customers to submit direct access requests to the FCC, the *Order* unlawfully and with no explanation triggers this process *21* days after publication in the Federal Register, rather than 60 days as required by law.

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To: The Commission

REQUEST OF COMSAT CORPORATION
FOR STAY PENDING JUDICIAL REVIEW

Pursuant to Sections 1.41, 1.43, and 1.44(e) of the Commission's Rules, COMSAT Corporation ("COMSAT") hereby requests that the Commission stay pending judicial review the implementation of the Report & Order adopted in *Direct Access to the INTELSAT System*, FCC 99-236, IB Docket No. 98-192 (rel. Sept. 16, 1999) ("*Order*"). The *Order* has not yet been published in the Federal Register. COMSAT seeks this emergency relief because the *Order* reverses almost four decades of settled practice and precedent establishing that the Communications Satellite Act of 1962 (the "Satellite Act"), Pub. L. No. 87-624, 76 Stat. 425 (1962), *codified at* 47 U.S.C. §§ 701-744, grants COMSAT the exclusive right to provide international satellite services to and from the U.S. via the INTELSAT system. The effect of this reversal is to allow COMSAT's customers to bypass COMSAT and to purchase international satellite transmission services directly from INTELSAT, an international treaty organization in which COMSAT is by statute the sole U.S. participant. Whereas the Commission has previously barred COMSAT from selling INTELSAT capacity in the

domestic U.S. market on the ground that COMSAT's limited immunity from the antitrust laws would distort competition, the Commission now directly injects INTELSAT into the U.S. international market notwithstanding its unlimited immunity from federal taxation, regulation, and the antitrust laws.

With direct access, COMSAT would become primarily a passive investor in INTELSAT, rather than a supplier of satellite services. This result is patently at odds with the role envisioned for the company under the Satellite Act, and with the nature of COMSAT's business activities since its formation. The line of business that the *Order* will directly affect now accounts for 42% of the company's revenues and 59% of its operating income. Affidavit of Allen E. Flower, Vice President and Chief Financial Officer of COMSAT Corporation, ¶ 4 (dated Oct. 5, 1999) (attached) ("Flower Affidavit"); Thus, the *Order* would inflict irreparable injury on COMSAT, and cause it to lose customers, sales, and millions of dollars in revenue. Flower Affidavit, ¶ 10. In contrast, a stay of the *Order* pending completion of judicial review would not substantially injure any interested party, or the public interest.

BACKGROUND

COMSAT is a District of Columbia corporation that provides international satellite communications services and other related services to a variety of users. Its stock is publicly traded on the New York Stock Exchange (Symbol: CQ). COMSAT's headquarters is located in Bethesda, Maryland. The company currently employs approximately 1,600 people nationwide.

Although COMSAT is a private corporation, *see* 47 U.S.C. § 731, its creation was specially authorized by Congress in response to President John F. Kennedy's call for the

development and operation of the world's first satellite system. *See* Statement of the President on Communications Policy (July 24, 1961), *appended to* S. Rep. No. 1584, 87th Cong., 2d Sess. 25 (1962), *and reprinted in* 1962 U.S.C.C.A.N. 2269, 2287. Beginning in 1961 and through the summer of 1962, lawmakers considered three ways to accomplish this goal: establishing a new government agency, authorizing a consortium of existing U.S. carriers like AT&T, or chartering a new, private corporation. *See, e.g.*, S. 2890, 87th Cong., 2d Sess. (1962) (proposing government ownership); S. 2650, 87th Cong., 2d Sess. (1962) (proposing carrier joint venture); H.R. 11040, 87th Cong., 2d Sess. (1962) (Kennedy-initiated proposal to charter new, private corporation that ultimately was adopted as the Satellite Act). As President Kennedy had urged, Congress settled on the last option.[2]

Accordingly, the Satellite Act states that "United States participation in the system shall be in the form of *a* private corporation," 47 U.S.C. § 701(c), which operates "*for profit*," 47 U.S.C. § 731 (emphasis added); *see also* 47 U.S.C. § 702(8) (defining the term "corporation" to mean "*the* corporation authorized by [Section 731]," *i.e.*, COMSAT) (emphasis added). The Act grants only COMSAT the authority to "own" and "operate" this satellite system and to "furnish, for hire, channels of communication" to carriers and other users of that system. 47 U.S.C. § 735(a)(1)-(2). Congress also erected an extensive statutory scheme of structural

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[2] The decision to charter a new, private corporation was made primarily to address the need of the undertaking for significant investment by non-government sources. *See Antitrust Problems of the Space Satellite Communications Systems, Part 1: Hearings on S. 258 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 34, 52 (1962) (noting that private ownership offered a "greater chance ... of getting substantial amounts of funds").

and regulatory safeguards applicable to COMSAT's unique role as the "chosen instrument"[3] in the global satellite system which became INTELSAT.[4]

Within two years of COMSAT's inception, U.S. policymakers, in conjunction with their foreign counterparts, moved toward establishing the global satellite system now known as INTELSAT—and the President of the United States designated COMSAT as the United States "Signatory" to the new entity. COMSAT initially designed and built the INTELSAT system as its general manager. The general manager role ended in the early 1970s when interim international agreements were replaced by the INTELSAT Agreement now in force, but COMSAT remains the U.S. Signatory. *See generally* Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT," done Aug. 20, 1971, 23 U.S.T. 3813 ("INTELSAT Agreement") (establishing INTELSAT); Operating Agreement Relating to the International Telecommunications Satellite Organization "INTELSAT," done Aug. 20, 1971, 23 U.S.T. 4091 ("INTELSAT Operating Agreement").

Today, INTELSAT operates a fleet of 19 geostationary satellites that provide space segment capacity for voice, data, video, and Internet transmissions to more than 200 countries and territories. As U.S. Signatory, COMSAT is the sole U.S. investor in INTELSAT and

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[3] *Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 74 F.C.C. 2d 59, 64 (1979) (Interim Report and Notice of Inquiry), *finalized*, *COMSAT Study*, 77 F.C.C. 2d 564, 587 (1980) (Final Report & Order) ("*COMSAT Study*").

[4] *See, e.g.*, 47 U.S.C. § 721(c)(1) (directing the FCC to insure effective competition in the procurement by COMSAT and the carriers of equipment and services required for the establishment and operation of the system); 47 U.S.C. § 721(c)(2) (directing the FCC to insure that all authorized carriers have "nondiscriminatory use of" and "equitable access to" the system); 47 U.S.C. § 734(b)(2) (precluding authorized carriers from owning, in the aggregate, more than 50% of COMSAT's voting shares).

participates in the governance of the system, subject to instructions from the U.S. government on matters that may affect U.S. national interests and foreign policy. *See* 47 U.S.C. § 735(a) (authorizing COMSAT alone or in conjunction with *foreign* entities to invest in, own, manage, and operate the global satellite system); INTELSAT Agreement, Art. VIII, 23 U.S.T. at 3828-31 (setting forth specific powers and responsibilities of Signatories in the governance of INTELSAT); *see also* 47 U.S.C. §§ 721(a), 742 (subjecting COMSAT to instructions from the U.S. government on matters that may affect U.S. national interests and foreign policy).

Since COMSAT's inception in 1962, its principal line of business has been the sale of INTELSAT space segment capacity to other carriers and "authorized users" in the United States. This continues to be the case today, although many other satellite systems now provide service to and from the United States in competition with COMSAT and INTELSAT. At present, about half of COMSAT's revenues come from its COMSAT World Systems ("CWS") division, which provides INTELSAT capacity on a non-discriminatory basis to U.S. international service carriers and users.[5] The largest portion of CWS's revenues, in turn, come from its provision of full-time voice-grade half-circuits (two-way communications links between an earth station and an INTELSAT satellite) to U.S. international communications

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[5] In the first half of 1999, $165.2 million of COMSAT's $300.4 million in total revenues were attributable to its CWS business segment. Flower Affidavit, ¶ 3; COMSAT Corp., *1999 Second Quarter SEC Form 10-Q* at 2, 10 (filed August 16, 1999) < http://www.sec.gov/Archives/edgar/data/22698/0000022698-99-000004.txt>. In 1998, $303.1 million of COMSAT's $616.5 million in total revenues were attributable to its CWS business segment. Flower Affidavit, ¶ 3; COMSAT Corp., *1998 SEC Form 10-K* at 31 (filed Mar. 25, 1999) ("*1998 Form 10-K*") <http://www.sec.gov/Archives/edgar/data/22698/0000928385-99-000926.txt>. In 1997, $286.1 million of COMSAT's $562.6 million in total revenues were attributable to its CWS business segment. Flower Affidavit, ¶ 3; *1998 Form 10-K* at 31.

common carriers, such as AT&T, MCI WorldCom, and Sprint.[6] In total, COMSAT's revenues from the sale of INTELSAT-based services currently constitute 42% of its total revenues and produce 59% of the pre-tax operating income of the company. Flower Affidavit, ¶ 4.

COMSAT acquires space segment directly from INTELSAT. COMSAT pays for such capacity using an accounting unit—set by INTELSAT and payable in U.S. dollars—known as the "INTELSAT utilization charge," or "IUC." Under the INTELSAT Agreement, COMSAT is obligated to provide capital to INTELSAT in proportion to the total U.S. ownership of INTELSAT space segment. *See* INTELSAT Agreement, Art. V, 23 U.S.T. at 3822-23; INTELSAT Operating Agreement, Art 4, 23 U.S.T. at 4094-95. The difference between the IUC and the FCC-tariffed or contract rates that COMSAT charges its U.S. customers reflects the additional costs that the company bears in providing INTELSAT-based service, including the cost of providing a return on shareholder capital. As the FCC has noted, "the IUC, while serving as a measure of the costs INTELSAT incurs in operating the system, is not a measure of COMSAT's costs because it does not reflect the internal costs which COMSAT incurs making satellite circuits available to U.S. customers and engaging in other activities connected with its role as U.S. Signatory."[7] Indeed, the IUC does not serve

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[6] Flower Affidavit, ¶ 5; *1998 Form 10-K* at 3.

[7] *In the Matter of Direct Access to the Intelsat System*, 13 FCC Rcd 22013, 22015-16 & n.16 (1998) (Notice of Proposed Rulemaking) ("*Direct Access NPRM*") (citing *Regulatory Policies Concerning Direct Access to INTELSAT Space Segment for the U.S. International Service Carriers*, 97 F.C.C. 2d 296, 310-19 (1984) (Report and Order) ("*1984 Direct Access Order*"), *aff'd*, *Western Union Int'l, Inc. v. FCC*, 804 F.2d 1280 (D.C. Cir. 1986)). *See also Order*, ¶¶ 61, 66, 71 (identifying various COMSAT costs that are not reflected in the IUC); Prof. Jerry R. Green, Prof. Hendrik S. Houthakker, & The Brattle Group, *An Economic*

(Continued...)

even as a full measure of COMSAT's direct, INTELSAT-related costs; COMSAT and other signatories also are liable for, and are regularly subject to, "capital calls" issued to finance new satellites for the system. *See* INTELSAT Operating Agreement, Art. 4, 23 U.S.T. at 4094-95.

Although COMSAT has (until now) exercised an exclusive right to sell U.S. international satellite services over the INTELSAT system in which it has invested, COMSAT is by no means the sole provider of international transmission capacity to and from the United States. Today, nearly 200 commercial geostationary ("GEO") communications satellites owned by 53 different carriers are orbiting the earth.[8] Only 19 of these satellites, representing less than 10% of total GEO satellites in operation, belong to INTELSAT. *See INTELSAT Satellites Web Page* (visited Oct. 5, 1999) <http://www.intelsat.int/tech/sats/satelite.htm>. In comparison, COMSAT's largest rival, Hughes-PanAmSat (which is owned by General Motors), plans to have a global fleet of 25 satellites in operation by 2001. *See PanAmSat*

(Continued)
Assessment of the Risks and Benefits of Direct Access To INTELSAT in the United States 13, 26 (Dec. 21, 1998), *submitted to the FCC in* Comments of Comsat Corp., IB Docket No. 98-192, Appendix 3 (filed Dec. 22, 1998) ("Brattle Group Economic Assessment") (noting that the IUC is an internal INTELSAT accounting measure that does not even purport to reflect COMSAT's costs of providing service).

[8] *See* Cynthia Boeke and Robustiano Fernandez, *Satellite Trends and Statistics Via Satellite's Global Satellite Survey*, Via Satellite, Vol. 13 No. 7, July 1, 1998, *available in* 1998 WL 10690297 (setting forth these statistics based on an industry survey); *Phillips Satellite Industry Directory* 17-234, 279-413 (21st ed. 1999) (setting forth complete information about each of these satellites and their operators); *see also* Leslie J. Nicholson, *Odds Were Against Satellite's Failure After Only 5 Years*, The Philadelphia Inquirer, May 21, 1998, *available in* 1998 WL 13376784 (citing Satellite Industry Association Director Clayton Mowry's estimate that in May, 1998, about 187 working commercial geostationary communications satellites were orbiting the earth).

Media Kit/Facts Web Page (visited Oct. 5, 1999) <http://www.panamsat.com/media/facts.htm>. Accordingly, in 1998, the FCC determined that "other satellite companies effectively compete against Comsat and the INTELSAT satellite system" for virtually all services in most of the international markets. *COMSAT Corp., Forbearance from Dominant Carrier Regulation*, 13 FCC Rcd 14083, 14096 (1998) (Order & Notice) ("*COMSAT Non-Dominance Order*"), *supplemented, Policies and Rules For Alternative Incentive Based Regulation of COMSAT Corporation*, 14 FCC Rcd 3065 (1999) (Report & Order); *see also Transfer of Control of COMSAT Government Systems, Inc. from COMSAT Corp. to Lockheed Martin Regulus LLC*, FCC 99-237, at ¶ 46 (rel. Sept. 15, 1999) ("*Lockheed Martin Merger Order*") (noting that COMSAT's competitors are large corporations that are vertically integrated with even larger aerospace manufacturers).[9]

COMSAT's facilities-based competitors include not only other global satellite systems but also transoceanic submarine fiber optic cables, which currently carry over 85% of telephone and switched data traffic to and from the United States, providing an effective substitute for satellite telecommunications. *Order*, ¶ 124. At present, more than 77 U.S. facilities-based carriers provide a wide array of voice, data, and video services to the United States market over fiber optic cable and satellite. *Order*, ¶ 46. COMSAT's exclusive franchise via INTELSAT accounts today for only about a 15% share of the market for international voice and data capacity. *See Order*, ¶ 124 (based on 1997 data).

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[9] The Commission found that "Columbia, Orion, GE American Communications and Hughes/PanAmSat are a few of the companies that provide these services." *COMSAT Non-Dominance Order*, 13 FCC Rcd at 14096.

Because of the competitive state of the international telecommunications marketplace, the FCC in April 1998 reclassified COMSAT as a "non-dominant carrier" on every major route to or from the United States. *See COMSAT Non-Dominance Order*, 13 FCC Rcd at 14173. This constituted a determination that COMSAT has no monopoly or market power—defined as "a dominant carrier's ability to raise or maintain prices above costs, control prices, or exclude competition"[10]—on these routes, which account for more than 92% of COMSAT's INTELSAT-based income and business.[11] Earlier this year, the Commission adopted a new incentive regulation regime for the so-called "thin routes" (which carry a low volume of communications traffic); this new regulatory scheme also precludes COMSAT from exercising whatever market power it may arguably possess for this dwindling number of overseas routes. *Policies and Rules for Alternative Incentive Based Regulation of COMSAT Corp.*, 14 FCC Rcd at 3073-74, 3076-77.

During the FCC's proceeding on COMSAT's non-dominance petition, several commenters urged the Commission to condition the grant of COMSAT's petition upon the implementation of so-called "direct access" to the INTELSAT system. These proposals were modeled on a proposal identical to one that the Commission had previously rejected as

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[10] *Id.*, 13 FCC Rcd at 14118 & n.129 (citing cases).

[11] *See id.* at 14131 (finding that "Comsat does not have market power in the provision of switched voice service in competitive markets, particularly when competing cable systems are considered."); *id.* at 14147 (finding, based on 1997 data, that the noncompetitive "thin route" markets accounted for about 10% of total international traffic to and from the United States, measured by volume); *Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, 14 FCC Rcd at 3065 (noting, based on 1997 data, that about 8% of Comsat's revenues are derived from "non-competitive" INTELSAT services markets to such destinations as Algeria, Estonia, and Western Samoa).

contrary to the public interest.[12] In April 1998, the FCC declined to impose a direct access condition on COMSAT's regulatory reclassification as a non-dominant carrier. *See COMSAT Non-Dominance Order*, 13 FCC Rcd at 14160. Six months later, however, the agency issued the Notice of Proposed Rulemaking that initiated this proceeding. *Direct Access NPRM*, 13 FCC Rcd 22013 (1998).

On July 1, 1999, by a 100-0 vote, the Senate passed a bill that would prohibit direct access to INTELSAT. Specifically, the bill (S. 376) would bar INTELSAT "from entering the United States market directly to provide any satellite communications services or space segment capacity to carriers (other than the United States signatory) or end users in the United States until July 1, 2001 or until INTELSAT achieves a pro-competitive privatization . . . if privatization occurs earlier."[13] This prohibition is a key component of the bill's strategy for hastening the privatization of INTELSAT. As the Senate Commerce Committee Report explains:

> S. 376 leverages access by INTELSAT to the most lucrative telecommunications market in the world—the United States market—as an incentive to achieve a rapid pro-competitive privatization. In so doing, the legislation withholds direct market access from INTELSAT until it is privatized, denying them the ability to expand their market presence and solidify a broader customer base. S. 376 embraces the view that any satellite

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[12] *See 1984 Direct Access Order*, 97 F.C.C. 2d at 298 (rejecting direct access proposals after concluding that "whatever benefits are to be derived . . . would [not] be so substantial as to outweigh the adverse consequences which are likely to attend the adoption and implementation of direct access.").

[13] S. 376, 106th Cong., 1st Sess. § 4 (1999) (as passed by the Senate July 1, 1999) (setting forth new Satellite Act § 603(a)), *reprinted in* 145 Cong. Rec. S8297, S8298 (daily ed. July 12, 1999).

> privatization legislation must include incentives for INTELSAT to privatize in a pro-competitive manner.[14]

On July 12, 1999, the bill was transmitted to the House of Representatives and referred to the House Commerce Committee.[15]

On September 15, 1999, the FCC adopted the *Order*. It provides that "Level 3 direct access to INTELSAT shall be available to carriers and users authorized to obtain INTELSAT space segment capacity for the provision of telecommunications services to and from the United States. . . ." *Order*, ¶ 206. This means that COMSAT's customers will be authorized to "enter into a contractual agreement with INTELSAT for the purpose of ordering, receiving, and paying for INTELSAT space segment capacity at [essentially] the same rate that INTELSAT charges [COMSAT]. . . . " *Order*, ¶ 2.

The FCC determined that COMSAT may collect a surcharge that amounts to 5.58% of the IUC, to compensate COMSAT for "direct costs undertaken in performing its [statutorily required] Signatory functions on behalf of the U.S. government and all users of INTELSAT services." *Order*, ¶ 52. The *Order* forbids COMSAT from including in the surcharge amounts to cover its corporate tax liabilities, as well as costs associated with COMSAT's investment and operating liabilities. Thus, under the pricing scheme adopted in the *Order*, COMSAT's rates will be determined primarily by INTELSAT and will be tied to the level of

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[14] *Report of the Sen. Comm. on Commerce, Science, and Transportation on the Open-Market Reorganization for the Betterment of International Telecommunications Act*, S. Rep. No. 106-100, at 2 (1999) <http://thomas.loc.gov/cgi-bin/cpquery/z?cp106:sr100:>.

[15] *See* 145 Cong. Rec. H5337 (daily ed. July 12, 1999) (S. 376 transmitted to the House of Representatives; 145 Cong. Rec. H5361 (daily ed. July 12, 1999) (S. 376 referred by the Speaker of the House to the House Commerce Committee).

IUCs. *Order*, ¶ 72. In effect, the *Order* strips COMSAT of control over its ability to earn a reasonable return or to recover the costs that underlie its rates—both will now shift to INTELSAT's control.

Also, despite the requirement in Administrative Procedure Act that orders not take effect until 30 days after public notice, 5 U.S.C. § 553(d), and the explicit statement in the document's ordering clauses that the *Order* will not take effect until 60 days after publication in the Federal Register, the Commission seeks to begin implementing direct access within 21 days of public notice. *Order*, ¶¶ 207, 216. Yet the *Order* cites no justification for advancing the effective date.

COMSAT hereby asks the Commission to stay the implementation of the *Order* pending judicial review, which COMSAT intends to seek expeditiously. If, however, the Commission rejects or fails to grant this Request by October 13, 1999, COMSAT intends to seek a stay of the *Order* from the United States Court of Appeals.

ARGUMENT

The present case satisfies all of the relevant criteria for a stay pending review. COMSAT's challenge to the *Order* is likely to succeed on the merits. Without a stay, COMSAT will suffer irreparable injury. Conversely, a stay would harm neither the Commission nor COMSAT's customers or competitors, nor the public interest. In fact, it would merely preserve what has already been the *status quo* for nearly four decades.

A stay pending review would be appropriate even if the Commission were not to agree that all of these elements are satisfied here. *See Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998) (noting that factors for a stay relate on a "sliding scale" and that "[i]f the

arguments for one factor are particularly strong, an injunction may issue even if the arguments in the other areas are rather weak"). This is so because "an injury held insufficient to justify a stay in one case may well be sufficient to justify it in another, where the applicant has demonstrated a higher probability of success on the merits." *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam). Where, as here, an agency's construction is so "contrary to the plain language of [the governing statute,] and therefore unenforceable" that the agency appears "likely to lose on the merits," the agency's order should be stayed without regard to the other factors. *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1066 (D.C. Cir. 1998).[16] Even where the possibility of irreparable harm is slight, a stay should be granted if the movant carries its "burden of convincing with a reasonable certainty that it must succeed at the final hearing." *District 50, United Mine Workers of America v. International Union, United Mine Workers of America*, 412 F.2d 165, 168 (D.C. Cir. 1969) (citing cases) (internal punctuation marks omitted).

In essence, a stay maintaining the *status quo* should be granted "when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm." *Florida Pub. Serv. Comm'n*, 11 FCC Rcd 14324, 14325-26 & n.11 (1996) (citing *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)). Here, it is clear that, at the very least, a serious legal question is presented as to the lawfulness of the Commission's *Order*. Because

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[16] *Accord Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12 (7th Cir. 1992) ("the more likely it is the plaintiff will succeed on the merits, the less the balance of irreparable harms need weigh towards its side") (citing cases); *Roland Machinery Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984) (Posner, C.J.) ("The more likely the plaintiff is to

(Continued...)

implementation of the *Order* would overturn business relationships, practices, and usages in place for more than three decades, and harm COMSAT far more severely than a stay would harm any other party, the Commission should stay the *Order* pending judicial review.

I. COMSAT Is Likely to Prevail on the Merits

The Commission's new reading of Subsection 735(a)(2) of the Satellite Act contravenes the plain meaning of the statute, as well as the Satellite Act's principles, policies, structure, and legislative history—all of which confirm that COMSAT was vested with the exclusive U.S. right to furnish the satellite capacity it paid for on the global system now known as INTELSAT. It also contradicts the FCC's, and the federal courts', long-standing interpretation of that Act, replacing it with an interpretation that, at best, raises serious constitutional questions. In addition, because the FCC ignored material record evidence that contradicts the assumptions upon which the *Order* is based, its decision is also "arbitrary, capricious, . . . and otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Indeed, the *Order* constitutes a mere result-oriented effort to reach a predetermined outcome. Accordingly, a court is likely to "hold unlawful and set aside" the *Order*.

(Continued)
win, the less heavily need the balance of harms weigh in his favor").

A. A Court Is Likely to Set Aside the *Order* on the Ground That It Is Not in Accordance with the Satellite Act

1. The FCC's Interpretation Is Inconsistent with the Text of the Satellite Act

The Satellite Act not only authorized the creation of COMSAT, it also directed COMSAT to finance, own, operate, and provide nondiscriminatory access to the world's first global satellite communications system. *See* 47 U.S.C. §§ 701, 731, 735(a)(1), 735(a)(2). Although COMSAT was authorized to establish the system "in conjunction and in cooperation with other countries," 47 U.S.C. § 701(a), the Act made clear that "United States participation in the system shall be in the form of *a* private corporation. . . ." 47 U.S.C. § 701(c) (emphasis added). In this regard, the Act authorizes the creation of "*a* communications satellite corporation *for profit* which [is not] an agency or establishment of the Unites States Government." 47 U.S.C. § 731 (emphasis added); *see also* 47 U.S.C. § 702(8) (defining the term "corporation" to mean "*the* corporation authorized by [Section 731]," *i.e.*, COMSAT) (emphasis added). It renders "*[t]he* corporation" subject to the provisions of the Satellite Act, 47 U.S.C. § 732 (emphasis added), and Titles II and III of the Communications Act, 47 U.S.C. § 741 (emphasis added).

Most significantly for present purposes, the Act defines exactly how "the" corporation—*i.e.*, COMSAT—is to "participat[e] in the global system" on behalf of the United States, 47 U.S.C. § 701(c), and engage in related earth station activities. "In order to achieve the objectives and to carry out the purposes of [the Satellite] Act," Section 735(a) authorizes *COMSAT* to:

> (1) plan, initiate, construct, own, manage, and operate itself or in conjunction with foreign governments or business entities a commercial communications satellite system;

> (2) furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities, foreign and domestic; and
>
> (3) own and operate satellite terminal stations when licensed by the Commission under Section 721(c)(7) of this title.

By this language, Congress codified its intention that COMSAT be the sole entity authorized to "furnish, for hire, channels of communication to United States communications common carriers and to other authorized entities" of the global satellite system.[17]

Section 735(a) is structured so as to enumerate COMSAT's *exclusive* rights, except in those limited circumstances where Congress intended to explicitly allow for COMSAT to work in cooperation or competition with other entities. Thus, Subsection 735(a)(1) authorizes COMSAT to build and operate the world's first satellite system either exclusively or in cooperation with other foreign entities. Subsection 735(a)(3) makes plain the COMSAT may own and operate earth stations—by explicitly referring to another provision, Section 201(c)(7), that states that earth station licenses are not exclusive to the new company. Subsection 735(a)(2), however, empowers only COMSAT to "furnish, for hire, channels of communication" to U.S. users.

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[17] The legislative history demonstrates the clear intent of Congress (and the Administration) that COMSAT alone act as a "carriers' carrier." The Senate Commerce Committee Report accompanying the Satellite Act states that COMSAT will "furnish for hire channels of communication to United States communication common carriers who, *in turn*, will use such channels in furnishing their common carrier communications services to the public." S. Rep. No. 1584, 87th Cong., 2d Sess. 10-11 (1962), *reprinted in* 1962 U.S.C.C.A.N. 2269, 2272 (emphasis added). Similarly, Senator John Pastore, floor manager for the legislation that became the Satellite Act, said in floor debates that the existing U.S. carriers would "be the principal customers" of COMSAT for the space segment services of the global system. 108 Cong. Rec. 16,873 (1962) (statement of Sen. John Pastore).

Yet the *Order* reads Section 735(a) as creating ambiguity where there is none. While the FCC concedes that Subsection 735(a)(1) is exclusive (which is correct, of course, with respect to COMSAT's position as the U.S. owner/investor), it finds the very next subsection to be unclear with respect to the exclusive nature of COMSAT's rights—even though that provision mentions no other entity at all and cross-references no other subsection of the statute. Having created its own ambiguity, the FCC proceeds to exercise interpretative discretion where none is either permitted or warranted. *See Order,* ¶¶ 151-52.

The interpretation of Subsection 735(a)(2) that the Commission advances not only contradicts the maxim that "[s]tatutory construction . . . is a holistic endeavor," *United Savings Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1987),[18] it also presumes that COMSAT's investors agreed to undertake the *obligation*—which remains in effect today—to "plan, initiate, construct . . . and operate" a commercial satellite system without a correlative promise that *the* corporation would have the exclusive right to provide access to the capacity it owns on the global satellite system. This is an untenable supposition, as the FCC and the courts have hitherto recognized for decades. Given that—as the agency acknowledges—the authorizing language of Section 735(a) is exclusive with respect to

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[18] Thus, "[w]hen interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such construction as will carry into execution the will of the Legislature." *Kokoszka v. Bedford*, 417 U.S. 642, 650 (1974) (quoting *Brown v. Duchesne*, 60 U.S. (19 How.) 183, 194 (1857)); *accord Regions Hosp. v. Shalala*, 118 S. Ct. 909, 917 n.5 (1998) ("context counts, and . . . [i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.") (quoting *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993)) (internal punctuation marks omitted).

COMSAT's rights in the United States under subsection (1), it must also be exclusive with respect to COMSAT's U.S. rights under subsection (2). And where Congress intended for COMSAT's U.S. rights to be non-exclusive—as under subsection (3)—it explicitly said so.

A review of the legislative history of these subsections confirms this reading. As a Senate report concerning the legislation states, an early version of the Satellite Act did grant COMSAT exclusive authority to own and operate earth stations—until Congress decided to affirmatively change that subsection:

> The [Kennedy] administration bill originally provided for "satellite terminal stations" ... to be owned and operated by the corporation [*i.e.*, COMSAT]. There was no mention of the additional possibility of joint or separate ownership of such stations by the corporation and authorized communication carriers. Amendments made by the committee in following portions of the bill would authorize such joint or separate ownership of these stations, and amendments in the definitions were made to conform to the change of policy.[19]

Significantly, the original bill did *not* express COMSAT's right to own and operate earth stations in the "terms of exclusivity" that the Commission now claims are needed to establish COMSAT's sole right. *Cf. Order*, ¶ 149. Nevertheless, the lawmakers understood the relevant provision as a grant of exclusivity and therefore felt compelled to make specific changes to allow for the "additional possibility" of earth station ownership by carriers. In contrast, there were *no* amendments allowing for the "additional possibility" of a role for carriers (other than as COMSAT's customers) in furnishing "channels of communication."[20]

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[19] S. Rep. No. 1319, 87th Cong., 2d Sess. 3 (1962).

[20] Moreover, under the Satellite Act as finally enacted, earth stations by definition are not part of the satellite system. *See* 47 U.S.C. § 702(2) (defining "satellite terminal station" as communication equipment capable of transmitting telecommunications *to* or receiving telecommunications *from* "a communications satellite system") (emphasis added). Accordingly, the fact that the statute permits competition in the construction and operation of

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The error of the FCC's interpretation is highlighted by the redundancies that its new reading of the Satellite Act would engender. For example, the Commission now contends that Section 721(c)(2), which directs the FCC to ensure "nondiscriminatory access" to the first global system, is an affirmative grant of power that allows the agency to authorize direct access. *See Order*, ¶ 153 (quoting 47 U.S.C. § 721(c)(2)). If this were true, however, there would be no need for Section 721(c)(7)—explicitly providing for competition in the ownership and operation of earth stations—because then earth stations, too, would be subject to the Commission's allegedly broad Section 721(c)(2) powers to ensure nondiscrimination. 47 U.S.C. § 721(c)(7).

To the contrary, a reviewing court most likely will interpret Section 721(c)(2) in the same way that it has been understood for nearly four decades: as making the FCC the government regulator obligated to ensure that all customers are treated equally *by COMSAT*.[21] Indeed, as envisioned by the *Order*, Level 3 direct access would render Section 721(c)(2) superfluous. The clear purpose of Section 721(c)(2) is to protect carrier customers of a

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earth stations says nothing about whether the statute grants the corporation exclusive access to the space segment of the satellite system.

[21] *See, e.g., COMSAT Application to Construct a "Standard B" Earth Station Antenna & Associated Facilities at Hickham, Haw.*, 97 F.C.C. 2d 100, 120 (1981) (decision of ALJ Kuhlmann) (holding that Section 721(c)(2) prohibits COMSAT from engaging in "discrimination in price and practices between different customers for the same service."); *Graphnet Systems, Inc.*, 67 F.C.C. 2d 1020, 1034 (1978) (Mem. Op. & Order) (holding that under Section 721(c)(2), "the Commission has an affirmative obligation to assure access *to Comsat's* facilities by those carriers authorized under the Communications Act of 1934"; therefore, "the Commission is not precluded from authorizing [any authorized carrier] to obtain service directly *from Comsat*." (emphasis added), *aff'd in pertinent part, ITT World Communications, Inc. v. FCC*, 595 F.2d 897 (2d Cir. 1979).

regulated common carrier entity. But the Commission cannot regulate INTELSAT, because it is an intergovernmental treaty organization. Thus, if direct access were permitted, the Commission would be unable to carry out this mandate.

Moreover, the Commission's new reading of the Satellite Act also cannot be reconciled with other "statutes on the same subject." *See Kokoszka*, 417 U.S. at 650 (statutes must be construed "in connection with . . . [other] statutes on the same subject . . . ."). Specifically, the International Maritime Satellite Telecommunications Act of 1978, Pub. L. No. 95-564, 92 Stat. 2392 (1978), *codified at* 47 U.S.C. §§ 751-57 ("Inmarsat Act") authorizes COMSAT's participation on behalf of the United States in another intergovernmental satellite organization, known as Inmarsat. The Inmarsat Act, which designates COMSAT as "the *sole* operating entity of the United States for participation in INMARSAT, for the purpose of providing international maritime satellite telecommunications services" 47 U.S.C. § 752(a)(1) (emphasis added), was expressly "modeled on the 1962 [Satellite Act], which provided the legislative basis for U.S. involvement in [INTELSAT] by way of a special corporation, COMSAT." *International Maritime Satellite Telecommunications: Hearing on S. 2211 and H.R. 11209 Before the Subcomm. on Communications of the Sen. Comm. on Commerce, Science, & Transportation*, 95th Cong., 2d Sess. 26 (1978) (incorporating letter from Ass't Att'y Gen. Patricia M. Wald).

The FCC now contends that Congress in 1978 intended to give COMSAT an exclusive right with respect to Inmarsat that COMSAT did not possess with respect to INTELSAT. But there is not one word in the hearings that preceded or the Congressional reports that accompanied the 1978 Inmarsat Act to suggest that COMSAT's role in Inmarsat was to be

characterized by rights and preferences larger than its role in INTELSAT. Indeed, until now, the Commission construed the 1962 and 1978 Acts *in pari materia* and held that both Acts designate "COMSAT as the chosen instrument of the United States to participate in international cooperative ventures for the establishment of global communications satellite systems." *Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 74 F.C.C. 2d at 64.

2. The FCC's Order Is Inconsistent with Almost Forty Years of Administrative and Judicial Understandings of the Act

The *Order's* construction of Section 735 also contradicts an unbroken line of Commission precedent, as well as an industry-wide, FCC-prescribed regulatory regime predicated on COMSAT's exclusive access. It thus would fail even if the statute were ambiguous, which it is not.[22] In its 1966 *Authorized User I* decision, for example, the Commission conceded that it lacked authority to permit direct access to INTELSAT — a concession at odds with the agency's usual claims to broad discretion. *See infra* p. 22. This 1966 order, as well as the agency's other early decisions recognizing COMSAT's exclusive

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[22] *See Good Samaritan Hospital v. Shalala,* 508 U.S. 402, 417 (1993) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held view.") (*citing INS v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (1987) (internal quotations omitted); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 257 (1991); *King Broadcasting v. FCC*, 860 F.2d 465 (D.C. Cir. 1988) ("[I]n determining whether an agency's statutory construction is permissible..., we must consider whether the agency has been consistent in its interpretation of the statute.") (citations omitted).

role in the international satellite system, are the seminal decisions around which the satellite industry developed and has operated for over four decades.[23]

The agency labors to distinguish its repeated, explicit statements supporting COMSAT's status as the sole provider of INTELSAT space segment to and from the United States. The *Order* variously contends that some statements were *dicta*, *Order*, ¶ 167, others were qualified and phrased so as to permit the Commission to reverse itself, *id.*, ¶ 168, and still others occurred in non-binding discussions of policy options, *id.*, ¶¶ 169-70. Ultimately, these explanations fail to overcome the cumulative weight of the agency's prior pronouncements and the *actual treatment* of COMSAT based on its exclusive franchise status.

The Commission itself identifies statements in five FCC proceedings that require explanation. *Id.*, ¶¶ 167-71. In so doing, the FCC overlooks other such statements identified by COMSAT. Moreover, the FCC's discussion of even the five is vague and general, and contrasts sharply with the agency's previous, unambiguous affirmations of COMSAT's exclusive direct access rights, catalogued below:

- In 1966, the agency noted that it "is not given authority to license any other U.S. carrier to operate the space segment. . . . Instead, such **carriers must procure the space segment facilities from Comsat**." *Authorized Entities & Authorized Users Under the Communications Satellite Act of 1962*, 4 F.C.C. 2d 421, 428 (1966) (emphasis added), *modified in other respects*, *Modification of Authorized User Policy*, 90 F.C.C. 2d 1394 (1982), *vacated sub nom.*, *ITT World Communications, Inc. v. FCC*, 725 F.2d 732 (D.C. Cir. 1984), *and reinstated on remand*, 100 F.C.C. 2d 177 (1985). The *Order* dismisses this statement as "*dicta*" to which the Commission is not bound. *See Order*, ¶ 167.

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[23] Moreover, as recently as six months ago, the Commission informed the U.S. Court of Appeals for the D.C. Circuit that "[b]y law, Comsat is the only United States entity permitted direct access to [the INTELSAT and INMARSAT] systems." Brief for Respondents FCC and United States, at 8 n.7, filed in *PanAmSat v. FCC*, No. 98-1408 (D.C. Cir. April 8, 1999).

- In 1970, the Commission recognized that COMSAT **"is the chosen instrument to provide space segment facilities** to licensees of earth stations in the United States." *Authorization of Satellite Facilities For the Handling of Transiting Traffic*, 23 F.C.C. 2d 9, 12 (1970) (Mem. Op. & Statement of Policy) (emphasis added), *clarified on recon. in other respects*, 30 F.C.C. 2d 513 (1971). Treating this statement in isolation, the *Order* says that it is not "determinative that the Commission lacks authority to permit direct access." *Order*, ¶ 168.

- In 1975, the agency stated that "[a]s U.S. **participant** in INTELSAT, **Comsat has the sole right to obtain capacity in the INTELSAT satellites** in order to provide international communications satellite services to U.S. communications common carriers and other authorized users under published tariffs." *COMSAT, Investigation into Charges, Practices, Classifications, Rates and Regulations*, 56 F.C.C. 2d 1101, 1116 (1975) (emphasis added), *vacated and remanded in part in other respects, COMSAT v. FCC*, 611 F.2d 883 (D.C. Cir. 1977). The *Order* fails to address this statement, see *Order*, ¶¶ 166-71, which expressly contradicts the agency's current position that COMSAT's exclusive right to "participate" in INTELSAT concerns only investment and governance but not the provision of service.

- In 1979, only a year after enactment of the Inmarsat Act, the FCC stated that the 1962 and 1978 Acts "both place specific obligations and responsibilities on Comsat **as the chosen instrument of the United States** to participate in international cooperative ventures for the establishment of global communications satellite systems." *Implementation of Section 505 of the International Maritime Satellite Telecommunications Act*, 74 F.C.C. 2d at 64 (emphasis added). "As such, the Corporation was to provide U.S. communications common carriers and other authorized users access to satellite facilities on a nondiscriminatory basis." *Id.* (citing 47 U.S.C. § 701(c)). The *Order* fails to address these statements, *see Order*, ¶¶ 166-71, which contradict the agency's current position that the two Acts give COMSAT different roles with respect to the provision of service.

- In 1980, the agency reiterated that the Satellite Act "creates a single entity in the form of a private corporation to carry out its objectives and purposes . . . [and] endows [COMSAT] with extraordinary powers and privileges to carry out its mission, including **monopoly status in the provision of services via the satellite system** to authorized U.S. users." *COMSAT Study*, 77 F.C.C. 2d at 587 (emphasis added). The *COMSAT Study* also states the nature of the exchange of obligations and rights established by U.S. law: "As the U.S. Signatory to the Operating Agreement, Comsat maintained its roles as (1) the U.S. entity obligated to make capital contributions to the capital requirements of INTELSAT, and pay appropriate utilization charges for use of space segment, and (2) **the sole U.S. provider of satellite transmission capacity to authorized U.S. communications common carriers** providing services between the U.S. and foreign countries, and

to other authorized users." *Id.* at 591 (emphasis added). Although the *Order* refers to a different section of the *COMSAT Study*, it does not address either of these statements. *See Order*, ¶ 169 & n.420.

- In 1982, the agency maintained that "Comsat was created under the Satellite Act as **the chosen instrument** of the United States government to build **and operate** a global communications satellite system." *Modification of Authorized User Policy*, 90 F.C.C. 2d 1394 (1982) (emphasis added), *vacated sub nom., ITT World Communications, Inc. v. FCC*, 725 F.2d 732 (D.C. Cir. 1984), *and reinstated on remand*, 100 F.C.C. 2d 177 (1985). Although the *Order* discusses the so-called "Authorized User II" Order in general terms, it fails to address this statement. *See Order*, ¶ 170 & nn.425-26.

Courts "accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration." *NLRB v. Bell Aerospace Co., Div. of Textron, Inc.*, 416 U.S. 267, 274-75 (1974); *see also EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Moreover, "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Bell Aerospace Co.*, 416 U.S. at 275 & n.7 (citing cases). The FCC simply has too much to explain away, and ultimately fails at the task.

The FCC's treatment of judicial constructions of the Satellite Act is similarly glib. The *Order* dismisses 20 years of federal case law in a paragraph, reasoning that the decisions in question did not "turn[ ] on" the issue of direct access. *See Order*, ¶ 172 & n.430. (The agency cites three cases and discusses two, omitting any discussion of other inconsistent cases raised by COMSAT.) Nevertheless, it is clear that each of these decisions states the only obvious and rational construction of the Satellite Act—that COMSAT has an exclusive franchise and that direct access is unauthorized:

- ***National Ass'n of Broadcasters* (1984):** The D.C. Circuit described COMSAT as "the U.S. representative to INTELSAT and **the sole U.S. entity permitted access to the system**." *National Ass'n of Broadcasters v. FCC,* 740 F.2d 1190,

1214 (D.C. Cir. 1984) (emphasis added).

- ***Western Union* (1986):** The D.C. Circuit stated that "**[o]nly Comsat, not the carriers, [can] obtain space segment facilities from Intelsat** . . . Comsat's exclusive access to Intelsat's satellite system [is] due largely to its statutorily defined role as the sole U.S. signatory to Intelsat"). *Western Union Int'l v. FCC*, 804 F.2d at 1283 n.2 (emphasis added). Although this statement was raised in the pleadings, the *Order* fails to discuss it and dismisses the case as entirely irrelevant because Commission authority to implement direct access was not directly at issue. *See Order*, ¶ 171.

- ***Jamaica Teleport* (1988)**: The D.C. Circuit found that the Satellite Act "established Comsat, a private, for-profit corporation, as **the vehicle** for United States participation in the envisioned global system." *Communications Satellite Corp. v. FCC*, 836 F.2d 623, 624 (D.C. Cir. 1988) (emphasis added). Although this case was raised in COMSAT's pleadings, the *Order* fails to discuss this statement, and cursorily dismisses the court's decision as "not relevant to the issue before [the agency] in this proceeding." *See Order*, ¶ 172 & n.430.

- ***Alpha Lyracom* (1990):** The Southern District of New York found that Congress "established COMSAT as a government-created monopoly" and "intended to establish, through a global system, **a single provider of international satellite services** to and from the United States." *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corp.*, 68 Rad. Reg. 2d (P&F) 405, 409 (S.D.N.Y. 1990) (emphasis added). Upholding the core of that decision on appeal, the Second Circuit noted that Congress "created COMSAT to wield monopoly power" and made COMSAT "**the sole provider of access** to the global Satellite System [INTELSAT] to U.S. communications carriers." *Alpha Lyracom Space Communications, Inc. v. Communications Satellite Corporation*, 946 F.2d 168, 174-175 (2d Cir. 1991) (emphasis added), *cert. denied*, 502 U.S. 1096 (1992).[24]

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[24] In addition, the Commission's new construction of Section 735 conflicts with the U.S. position on implementation of the WTO Basic Telecom Agreement. For example, the U.S. Trade Representative stated in Congressional testimony that "[t]he Administration believes, as does the FCC, that U.S. communications law provides authority to implement the U.S. commitments made under [the WTO] Agreement, without any further legislative action," because, among other things, those commitments "*reserve[ ] the exclusivity of Comsat*, particularly regarding INTELSAT and INMARSAT[.]" *Statement of Ambassador Charlene Barshefsky, United States Trade Representative, Before the Subcomm. on Telecommunications, Trade and Consumer Protection of the House Comm. on Commerce*, at 7 (March 19, 1997) (emphasis added). It is clear from the context of the U.S. reservation that COMSAT's exclusive right is statutory and that removal would require further legislative action.

The Commission's new interpretation will not withstand review. Accordingly, the *Order* should be stayed.

B. The *Order* Would Effect a Taking Without Payment of Just Compensation

The Commission's new interpretation of the Satellite Act is also to be avoided because it would give rise to a Takings claim. *United States v. X-Citement Video*, 513 U.S. 63, 64 (1994). Specifically, the Satellite Act directs COMSAT to "construct, own, manage, and operate" the communications satellite system in conjunction with foreign governments," 47 U.S.C. 735(a)(1). In furtherance of this directive, the INTELSAT Agreement *requires* COMSAT to invest in INTELSAT in direct proportion to the amount of capacity sold in the United States. *See* INTELSAT Agreement, Art. V, 23 U.S.T. at 3822-23; *id.*, Art. 4, 23 U.S.T. 4091, 4094-95. Thus, under the FCC's new reading of the Satellite Act, COMSAT's investment obligation now rests on the whim of direct access users—while the government also effectively deprives COMSAT of the ability to seek a just return in exchange for this obligation.

The Takings clause bars the federal government from directing companies to invest their funds in specific assets—particularly if the return on that investment is lower than they could earn elsewhere—if there is nothing received in exchange. *See Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925, 1933 (1998) ("property is more than economic value; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use *and dispose of* it.'") (citing cases); *see also Hodel v. Irving*, 481 U.S. 704, 715 (noting that "the right to pass on" property "is itself a valuable right"). COMSAT, at the express direction of U.S. law, has invested in INTELSAT

and, heretofore, has received in exchange the exclusive right to sell services provided via the INTELSAT system to U.S. users. Accordingly, the FCC's elimination of COMSAT's exclusive access would result in a taking.

Moreover, the *Order* purports to authorize a permanent physical occupation of COMSAT's circuits and transponder capacity, effecting a *per se* taking without payment of just compensation.[25] Thus, at the very least, to avoid substantial constitutional questions, a court is likely to construe the statute as barring direct access.

C. The *Order* Is Arbitrary and Capricious

COMSAT is also likely to succeed on the merits of its appeal because the *Order* is arbitrary, capricious, and not in accordance with law. *See* 5 U.S.C. § 706(2)(A). Indeed, the *Order* constitutes a mere result-oriented effort to reach a predetermined outcome. First, it is arbitrary and capricious for the Commission to effectively authorize INTELSAT—prior to privatization—to enter the U.S. marketplace with its treaty-based regulatory, tax, and antitrust privileges and immunities still intact. *See Order*, ¶¶ 94-116.[26] This outcome cannot be squared with the FCC's decision in other recent proceedings to exclude COMSAT from the U.S. domestic market precisely because of the intergovernmental organization's same

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[25] The 5.58% "surcharge" over the IUC set forth in the *Order* does not even purport to fully compensate COMSAT, omitting, for example, any return on investment and reimbursement for taxes.

[26] The *Order* limits INTELSAT use only with respect to those foreign Signatories that hold a 50% or greater share of the domestic market on the other end of a U.S. international route. *Order*, ¶ 98. It therefore does not preclude an ambitious foreign Signatory who—faced with new competition in its own domestic market—seeks to use INTELSAT to serve many foreign points outside its home country.

privileges and immunities, which the agency believes (at least sometimes) "could enable [it] to distort competition."[27] Unlike COMSAT, which already is subject to plenary FCC regulation as a common carrier, U.S. antitrust laws, and national taxes,[28] INTELSAT as currently constituted is immune from all these obligations. Accordingly, INTELSAT can offer below-market rates for service to and from the United States. Yet the Commission waves away this concern, stating that it "find[s] the potential benefits for American consumers to outweigh the risks of uneconomic pricing in such cases." *Order*, ¶ 99.[29] The Commission declined to make

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[27] *Amendment of the Commission's Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States*, 12 FCC Rcd 24094, 24148 (1997) (Report and Order) ("*DISCO-II Order*") (including tax-free exemption from income, corporate and property taxes, and customs and other duties in the host countries and other member states); *petition for review docketed sub nom., COMSAT v. FCC*, Docket No. 98-1011 (D.C. Cir. filed Jan. 12, 1998). The distinction between the U.S. domestic market and the U.S. international market obviously cannot justify such contrary approaches. Indeed, the FCC determined in the *Disco II Order* that the two markets are sufficiently linked to bar COMSAT (and, therefore, INTELSAT) from the domestic market—where COMSAT has a 0% market share—simply based on its presence in the U.S. international market. *Id.* at 24148-50.

[28] *Compare* INTELSAT Agreement, Art. XV(b), 23 U.S.T. at 3855 ("INTELSAT and its property shall be exempt in all States Party to this Agreement from all national income and direct national property taxation and from customs duties. . . .") *with id.* Art. XV(c), 23 U.S.T. at 3856 ("all Signatories acting in their capacity as such, *except [COMSAT]*, shall be exempt from national taxation on income earned from INTELSAT in [the United States]") (emphasis added); *see also DISCO-II Order*, 12 FCC Rcd at 24138 ("COMSAT pays taxes. . . ."); *Applications of COMSAT for Authority to Provide Aeronautical Service via the INMARSAT System*, 4 FCC Rcd 7176, 7177 (1989) (computing that COMSAT would pay roughly 36% of its gross aeronautical services income in taxes).

[29] *See also Order*, ¶ 115 ("We agree that direct access might create a temporary competitive distortion by allowing INTELSAT to provide service to U.S. users while being exempt from income taxes. However, we believe that U.S. customers of INTELSAT capacity and ultimately final consumers will gain . . . ."). The Commission also points out that the United States currently has no authority to impose U.S. taxes on INTELSAT—a situation which the agency often has noted in the past, but has never used as a reason for simply dismissing competitive concerns. *See, e.g., DISCO-II Order*, 12 FCC Rcd at 24138. (noting

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a similar finding in the case of COMSAT's entry via INTELSAT into the domestic market. *See DISCO-II Order*, 12 FCC Rcd 24094. Moreover, never before has the FCC tolerated concededly below-cost pricing on the ground that it would benefit consumers.

Second, the *Order*'s erroneous assumption that a 5.58% surcharge over the IUC will adequately compensate COMSAT is predicated on its equally baseless assumption "that the [INTELSAT] Board will establish IUC rates that reflect a market rate of return." *Order*, ¶ 78. This assumption is contrary to the record evidence. Indeed, in adopting this assumption, the Commission arbitrarily ignored COMSAT's direct evidence to the contrary—even while it accepted the same evidence in the context of limiting foreign Signatories' right to direct access. *Compare Order*, ¶ 78 (assuming that the IUC rates reflect a market rate of return) with *id.* ¶ 98 (finding that foreign Signatories have incentives to manipulate the IUC rates downward to obtain "artificially low direct access prices in markets where they themselves want to be direct access customers . . .").

Third, the FCC's sole finding that direct access will benefit the *public* interest (as opposed to the private interest of COMSAT's current customers) is its "anticipat[ion] that carriers and users will pass through any cost savings from direct access to consumers." *Order*, ¶ 38. Like the Commission's speculations about the IUC rate, this supposition lacks

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(Continued)
that INTELSAT, unlike COMSAT, "enjoy[s] tax-free status" and is therefore "exempt from income, corporate and property taxes, and customs and other duties in the host countries and other member states"); *id.* at 24148 (holding that INTELSAT has "unique characteristics as [a] treaty-based organization[] that could enable [it] to distort competition, . . [and concluding that] "[b]ecause of concern over potential harm to the U.S. market for satellite services, . . . this is not a situation that we are willing to extend to the U.S. domestic satellite market.").

any foundation in the record.[30] Indeed, the notion that carrier savings will be passed through to end users contradicts the evidence in the record.[31] Pointedly, the COMSAT customers who stand to gain the most from direct access—AT&T, MCI WorldCom, and Sprint—declined to commit to pass through any savings to end users. *See* Comments of AT&T, IB Docket No. 98-192, at 11 (filed Dec. 22, 1998), Comments of MCI WorldCom, IB Docket No. 98-192, at 14-15 (filed Dec. 22, 1998); Comments of Sprint, IB Docket No. 98-192, at 7 (filed Dec. 22, 1998).[32]

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[30] Despite FCC invitations to comment on how they would pass any cost savings to consumers, *not a single one* of the 17 parties filing comments in support of direct access—including every major retail carrier that provides international telecommunications services to U.S. end users—accepted the FCC's invitation. Indeed, the *Order* optimistically misstates that two commenting entities offered to pass their savings through to consumers. *See Order*, ¶ 38 (discussing comments of Loral Orion and IT&E). But neither entity in fact made such a pledge. Instead, relying on lawyerly distinctions, these entities promised only that direct access would create *incentives* for them to do so. *See id.* They very carefully, however, avoided making any concrete promise to act on these alleged incentives.

[31] *See* Comments of COMSAT Corp., IB Docket No. 98-192, at Part IV.B.4 (filed Dec. 22, 1999) ("COMSAT Comments"); Executive Summary of the Comments of COMSAT Corp., IB Docket No. 98-192, at 10-11 (filed Dec. 22, 1998); Reply Comments of COMSAT Corp., IB Docket No. 98-192, at 52-55 (filed Jan. 29, 1999) ("COMSAT Reply Comments"). COMSAT reviewed the FCC tariffs of the three major carriers for service to the 28 busiest U.S. international routes and showed that while COMSAT has reduced its rates by 55% to these carriers over the last few years, their basic rates to end-user customers have increased every year.

[32] To the extent that the *Order*'s unexpectedly low surcharge of 5.58% over the IUC rate may have been adopted in response to an eleventh-hour congressional letter, such a result would constitute both arbitrary and capricious decision making and a Due Process violation and would thereby provide an additional, independent ground for a stay. *See* Letter of FCC Chairman William Kennard (Sept. 15, 1999) (noting that the timing of a congressional letter raised concerns of interference with pending FCC proceeding and citing *Pillsbury Co. v. Federal Trade Commission*, 354 F.2d 952 (5th Cir. 1966)).

In sum, the *Order* will fail court review on the merits because the Commission lacks statutory authority to mandate direct access—even if the specter of the takings issues and arbitrary and capricious agency action were not also of concern. If the FCC is to have authority to permit direct access, that authorization must come from a new Act of Congress, not from the agency's own conception of how the existing statute should be rewritten in light of changed circumstances. The Commission is "not at liberty to release [itself] from the tie that binds it to the text Congress enacted" and may not "rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation." *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186, 1994-1195 (D.C. Cir. 1985).

II. The *Order* Will Cause Irreparable Harm To COMSAT Under Applicable Case Law

The *Order's* clear effect—and, indeed, its entire purpose—is to allow COMSAT's customers to contract with INTELSAT directly rather than purchase space segment capacity on the INTELSAT system from COMSAT. The only payment allowed to COMSAT is a limited Signatory surcharge, the sole purpose of which is to reimburse COMSAT for specified expenses it must incur on behalf of the United States representing its interests in INTELSAT. The Commission acknowledges that not all of COMSAT's costs would be recovered by this surcharge. *See, e.g.*, *Order*, ¶ 68. In these circumstances, enabling a company's customers to purchase a service at the same price paid by that company leaves the company without a mechanism to recover all of its costs and excludes the opportunity to earn a profit. *Order*, ¶ 2. Thus, the inevitable effect of the *Order* will be a loss to COMSAT of both customers and revenue, as the proponents of direct access admitted during the Commission's proceedings. This harm will be irremediable—and, because of COMSAT's unique status as a privately